STATE OF MICHIGAN
IN THE SUPREME COURT

ERIC A. BRAVERMAN, Successor Personal Representative of the Estate of Patricia Swann, Deceased,

Plaintiff-Appellee,

v

SC: 134445, 134446
COA: 264029, 264091
Wayne CC: 05-502345-NH

GARDEN CITY HOSPITAL, a/k/a GARDEN CITY HOSPITAL, OSTEOPATHIC,

Defendant,

and

JOHN R. SCHAIRER, D.O., GARY YASHINSKY, M.D., ABHINAV RAINA, M.D., and PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC.,

Defendants-Appellants.

REPLY BRIEF ON APPEAL- APPELLANTS

* * * ORAL ARGUMENT REQUESTED * * *

PROOF OF SERVICE

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ARGUMENT I

MCL 600.5852 DOES NOT PROVIDE AN ADDITIONAL TWO YEAR SAVINGS PERIOD TO A SUCCESSOR PERSONAL REPRESENTATIVE WHEN:

(1) THE PERSONAL REPRESENTATIVE(S) OF THE ESTATE DID NOT FILE SUIT WITHIN TWO YEARS WHICH WERE EARLIER AFFORDED TO THE ESTATE BY THE SAVINGS STATUTE; OR

(2) THE TIMING OF THE APPOINTMENT OF THE SUCCESSOR PERSONAL REPRESENTATIVE SUGGESTS THE APPOINTMENT WAS INTENDED TO OBTAIN ANOTHER TWO-YEAR SAVINGS PERIOD.

Most of the argument presented by plaintiff-appellee was anticipated and therefore already addressed in the defendants-appellants' principal brief on appeal. The following observations are intended to highlight plaintiff's failure to address adequately certain arguments, as well as to emphasize the lack of merit in those arguments addressed by plaintiff. Defendants will not respond to plaintiff's attempts to vilify the defendants and their positions on appeal because such tactics do not assist this Court in reaching the correct result.

At pages 13-14 of his brief on appeal, plaintiff contends that the notice of intent, dated July 8, 2004, tolled the two year savings period, and thus rendered timely the complaint filed on January 25, 2005. Under *Waltz v Wyse, D.O.*, 469 Mich 642; 677 NW2d 813 (2004), there is no notice of intent tolling, MCL 600.5856(c), of the two year savings statute, MCL 600.5852. *Waltz* applies retroactively to this case under the formula set forth by this Court in *Mullins v St. Joseph Mercy Hospital*, Supreme Court docket no. 131879 (November 28, 2007), by which *Waltz* is inapplicable only to those causes of action in which the two-year period elapsed "within 182 days after *Waltz* was decided." Thus, for *Waltz* to be inapplicable and tolling to apply, the savings period in this case must have expired by October 13, 2004. Here, the savings period expired on

October 29, 2004. Therefore, *Waltz* applies, notice of intent tolling is inapplicable, and the January 25, 2005 complaint was not filed within two years of the date letters of authority were issued to Grace Fler.

At page 16 of his brief on appeal, footnote 4, plaintiff argues that the two-year savings period did not start on August 8, 2002, but rather on October 29, 2002, the date letters were actually issued to Grace Fler. For purposes of this appeal, only, the record so reflects. Under *Waltz*, the complaint filed on January 25, 2005, is untimely *regardless* of whether the two-year period is measured from the date Ms. Fler was appointed personal representative, August 8, 2002, or the date the record reflects that letters were issued to her, October 29, 2002.

At pages 19-21 of his brief on appeal, plaintiff argues that there is no significance to the word "the" contained in the phrase "the personal representative" found in MCL 600.5852. According to plaintiff, the "*actual* statutory language recognizes that there may be successive personal representatives." (*Id.* at page 19) (emphasis original). This analysis begs the question of whether the phrase "the personal representative" relates to each person serving in that office and capacity (including successive personal representatives, to whom plaintiff points), or properly refers to the office or role of the personal representative, which is afforded a combined two year period in which to file a timely lawsuit under section 5852.

Plaintiff then counters that this Court's decision in *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003) "admits of no exceptions" and justifies plaintiff's desired construction of section 5852. This is incorrect because the *Eggleston* court never examined the significance of the phrase "the personal representative" in the course of its opinion. Rather, the *Eggleston* court rested its decision on the absence of the word "the" in the phrase

"letters of authority" to correct the inadvertent addition of the word "the" to this phrase by the Michigan Court of Appeals in its decision in *Eggleston*.

At page 20 of his brief on appeal, plaintiff argues erroneously that the defendants asked this Court to overrule *Eggleston* and to judicially manufacture an exception to MCL 600.5852. *Eggleston* is both legally and factually distinguishable from the present case. On a legal basis, the *Eggleston* court did not examine and thus did not resolve the meaning of the phrase "the personal representative." On a factual basis, the *Eggleston* court was not presented with a situation such as that in *Swann*, in which the estate had a two-year period in which it was authorized to file a timely lawsuit, but failed to do so.

At pages 25-26 of his brief on appeal, plaintiff contests the defense observation that allowing successor personal representatives each a new two-year period would lead to absurd consequences. The Court need not go beyond the *Waltz* portfolio of cases to verify this view. The savings statute is being used on multiple occasions to "save" lawsuits that became untimely based on a misinterpretation of *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2002) and avoidance of *Waltz, supra*. In fact, the plaintiff's bar sang this very tune when arguing for both prospective application of *Waltz*, confirmed in part in *Mullins*, and for equitable tolling. See *Ward v Siano, MD*, 272 Mich App 715; 730 NW2d 1 (2007). These are <u>not</u> situations in which additional time, "reasonable time," was needed to properly evaluate and then timely file a lawsuit in the death context. *Miller v Mercy Memorial Hospital Corporation*, 466 Mich 196; 644 NW2d 730 (2002) and *Lindsey v Harper Hospital*, 455 Mich 56; 464 NW2d 861 (1997). Nor is there a need to request the Legislature to amend the savings statute because the present construct of the savings statute supports defendants' view that only the office or role of personal representative is offered two years in which to file a timely lawsuit.

At pages 26-28 of his brief on appeal, plaintiff argues that there should be no intimation that Grace Fler was replaced as a personal representative for "some illegitimate reason." Plaintiff points to the decision of the probate court, unappealed, that Mr. Braverman be appointed as a successor personal representative, and then castigates the defendants for not appealing that decision, all the while arguing that they do not have standing in the probate court.

Plaintiff misunderstands the defense argument and thus reaches untoward conclusions. Absence an explanation by plaintiff for the replacement of the initial personal representative, and given the circumstances of *Waltz v Wyse*, it is disingenuous for plaintiff to be offended by any "insinuation" that the successor personal representative was strategically inserted to save the lawsuit. This point is in contrast to *Eggleston*, in which the initial personal representative died. There is an obvious difference in the circumstances, as further briefed by the defense in its principal brief on appeal.

Finally, plaintiff argues that the matter is not preserved for appellate review by all the defendants-appellants. This argument ignores the fact that a valid motion for summary disposition was presented to the trial court in which this ground was presented, that other defendants joined in that motion, that the order entered applied to all defendants, that upon denial of that motion in the trial court, this ground was placed in the application for leave to appeal, and that the Michigan Court of Appeals not only granted leave to consider this issue (order dated October 20, 2005), but actually did decide this issue with respect to these defendants. On a practical basis, plaintiff's view would cause havoc in the trial court by having co-defendant upon co-defendant refiling the exact same argument and motions before trial judges simply to avoid the "lack of preservation" objection which is now raised.

ARGUMENT II

THE FILING OF THE NOTICE OF INTENT BY THE INITIAL PERSONAL REPRESENTATIVE DOES NOT SATISFY THE REQUIREMENT OF MCL 600.2912b THAT A "PERSON" WHO "COMMENCE[S] AN ACTION" – HERE THE SUCCESSOR PERSONAL REPRESENTATIVE – BE "THE PERSON" WHO GIVES NOTICE OF INTENT.

The dichotomy in plaintiff's argument is striking. Whereas the savings statute, MCL 600.5852, does not afford an interpretation that "the personal representative" refers to the office or role of personal representative, the phrase "the person" in MCL 600.2912b, allows satisfaction of the notice of intent requirement by anyone in the office or role of personal representative, regardless of the individual ("the person") who occupied that role at the time the notice of intent was sent.[1] This makes no sense.

At pages 31-40 of his brief on appeal, plaintiff points to two provisions of the Estate and Protected Individual Code, MCL 700.3701 and 700.3713 for the proposition that a successor personal representative may utilize a notice of intent served by a predecessor personal representative. This analysis does not survive the plain meaning of MCL 600.2912b that the "person" who files a lawsuit be the same "person" who files a notice of intent. Neither of the EPIC provisions transforms Ms. Fler into Mr. Braverman on the date the notice of intent was mailed, July 8, 2004. Each provision is properly interpreted to allow Mr. Braverman to rely on his own acts prior to his appointment as personal representative. The record is clear that he never sent a notice of intent prior to appointment and he is not substituting into a court action of Ms. Fler pursuant to MCL 700.3613.

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[1] In this case, Eric Braverman was not the personal representative, but rather Grace Fler, when the notice of intent was sent on behalf of the estate on July 8, 2004. Plaintiff's position on appeal works only if Ms. Fler can be considered an agent for the office or role of personal representative, a proposition with which plaintiff vehemently disagrees with respect to the preceding argument.

At pages 39-40 of his brief on appeal, plaintiff cites MCR 2.202(B) for the proposition that Mr. Braverman, as a successor personal representative, is "the person" upon whom the right of action devolved for all purposes, including notice of intent. This court rule does not discredit defendants' position because it involves a post-complaint incident, rather than a pre-complaint requirement which, by statute, is placed specifically on the person who ultimately files the lawsuit.

ARGUMENT III

THE DISMISSAL WITH PREJUDICE IN THE SUBSEQUENTLY-FILED ACTION BY THE SUCCESSOR PERSONAL REPRESENTATIVE ACTS AS *RES JUDICATA* UNDER *WASHINGTON V SINAI HOSPITAL OF GREATER DETROIT*, AND BARS THIS ACTION.

Plaintiff makes two substantive arguments to defeat the application of *res judicata* in this matter: (1) the dismissal of the subsequent action on the basis of abatement does not constitute an "adjudication on the merits;" and (2) *res judicata* effect attaches only to the first action, and therefore does not bar litigation of the first-in-time filed lawsuit. Neither of these grounds has merit.

In *Washington v Sinai Hospital of Greater Detroit*, 478 Mich 412, 418-419; 733 NW2d 755 (2007), this Court noted specifically that MCR 2.504(B)(3), involving an involuntary dismissal, "does not distinguish between the grounds for a dismissal." *Id.* at 419. Thus, in the absence of any language in an order of dismissal limiting the scope of the merits decided, this court rule provides that an order operates as an adjudication of the entire merits of a plaintiff's claim. *Id.* Since the *Washington* order did not specify that it was without prejudice, or otherwise preserve adjudication of other issues to be decided, a decision in the first action was an adjudication of

the merits of the initial personal representative's claims, not just on the issue of whether he timely filed his claims. *Id.*

In *Swann v Garden City Hospital*, case no. 05-511888-NH, the order of dismissal provides specifically "with prejudice." (Apx 342a). The designation of a dismissal "with prejudice" was not by chance or error, but rather demanded by plaintiff (Court of Appeals opinion in docket no. 266505, slip opinion, pp 339-340a). Plaintiff thus unhinged the prior order of the trial court dismissing "without prejudice" case no. 05-511888-NH (order granting summary disposition, dated August 30, 2005 (Apx 337a)). The Michigan Court of Appeals affirmed specifically the grant of summary disposition and dismissal "with prejudice," a decision that was never appealed and thus acts as the law of the case in that matter (Court of Appeals opinion, p 4; Apx 341a). If, as plaintiff now contends, this is not adjudication on the merits, then plaintiff should not have insisted that the action be dismissed "with prejudice," or, upon realizing the ramification of such an adjudication, sought leave to appeal from this Court. Under the express rationale of *Washington, supra,* the dismissal "with prejudice" acts as adjudication on the merits.

None of plaintiff's authority involves a court rule's mandated effect which is triggered by a determination that the matter be dismissed "with prejudice." *Callanan v Port Huron & Northwestern Railway Company,* 61 Mich 15; 27 NW 718 (1886), was decided well before the adoption of the Michigan Court Rules. It is distinguishable in any event because the court determined that a submission to arbitration (as opposed to a second lawsuit, such as in this case) does not operate as a discontinuance of the cause, where the submission indicated that award shall be made by the judgment of the court. The *Callanan* Court rejected the notion that a private arrangement, namely arbitration, could trump the submission of the case to the jury. These facts do not remotely approach those involved in this case, in which the plaintiff filed

another action, admittedly based on the same occurrence, seeking a determination of the merits, which was then dismissed with prejudice against plaintiff. Unlike the situation in *Callanan, supra*, case no. 05-511888-NH was adjudicated the merits, *Washington, supra*, to which *res judicta* effect applies.

Gilman v Gilman, 249 P2d 361 (Wa 1952) does not assist plaintiff's position.[2] In *Gilman*, the Washington Supreme Court considered whether one spouse could maintain an action for divorce in one county where the other spouse had previously commenced an action for divorce in a different county. To prevent entry of an order on the merits in one of the actions, a writ of prohibition was sought and granted under the rule that no court of coordinate jurisdiction and power is at liberty to interfere with an action pending in another court. This is not what happened in our case because plaintiff affirmatively sought a dismissal "with prejudice" of the second action which, under *Washington*, acts as an adjudication on the merits. Therefore, the Court does not have the *Gilman* situation where two courts are racing towards a result on the merits when, in fact, only one should be allowed to enter a result on the merits.

Plaintiff's remaining authorities are similarly distinguishable on the facts, as well as the lack of any dismissal "with prejudice" under this State's or another state's court rules or statute that treats such a dismissal as adjudication on the merits.

The second point raised by plaintiff also lacks merit. There is no indication in the law that *res judicata* is limited to barring a subsequently-filed action. Indeed, when the Court talks about the "first case," it is obviously referring to the first case resolved on the merits. Here, the

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[2] At page 49 of his brief on appeal, plaintiff cites to the "universal rule" that abatement does not constitute an adjudication of the merit, and then notes this rule is exemplified by "the few decisions elsewhere that have had to address so fundamental and elementary a proposition." If, as plaintiff contends, there are so few decisions, then how can this be such a "universal rule?"

second-filed action was the first resolved on the merits, and thus acts as *res judicata* on the remaining action. If, as plaintiff contends, *res judicata* works only in one direction based on the date a lawsuit was filed, then the court will be faced with the anomalous situation of a plaintiff or a defendant escaping a determination on the merits (say a trial result through a jury verdict) on one case simply because it was tried before a case not yet tried but filed first in time.

Plaintiff also contends that this issue is not preserved for appellate review and thus should be rejected by this Court. As indicated in the text of Argument III, p 45 of defendants' appellate brief, this argument was not presented to the trial court or to the Michigan Court of Appeals because the Court of Appeals' opinion, which mandated a dismissal with prejudice of a subsequent action, was issued after the trial court proceedings and after briefing at the Michigan Court of Appeals level. *Braverman v Garden City Hospital, et al*, Court of Appeals Docket No. 266505, released May 16, 2006, (unpublished), found at Apx 338-341a. The argument was presented in the brief on appeal by reason of this Court's decision of *Washington v Sinai Hospital of Greater Detroit*, 478 Mich 412; 733 NW2d 755 (June 27, 2007), in which this Court held that a trial court's involuntary dismissal of an initial personal representative's wrongful death suit operated as an adjudication on the merits for *res judicata* purposes, and barred an action based on the same incident and the same allegations filed by a successor personal representative. The argument is presented in the appellate brief because it presents a question of law for this Court's determination in the event that the Court disagrees with the *Eggleston* argument and the notice of intent argument otherwise presented. In this fashion, the parties avoid a situation in which the matter is possibly remanded to the Wayne County Circuit Court for purposes of another round of summary disposition, another round of applications for leave to appeal or other Michigan Court of Appeals review, and ultimate resolution by this Court years into the future.

The argument is also presented because it involves one of the predicate issues in the series of legal issues presently before this Court, and recently resolved by this Court (*Washington, supra*) regarding the retroactive application of *Waltz* and *Eggleston*. Proper resolution of the case before the Court is better accomplished by a comprehensive review and definitive ruling on all the related issues involving *Waltz, Eggleston,* and *Washington v Sinai Hospital.*[3]

RELIEF

WHEREFORE defendants-appellants request this Court reverse the Court of Appeals' April 15, 2006 and June 5, 2007 opinions, and remand the matter to the Wayne County Circuit Court for entry of summary disposition in favor of the defendants. Defendants-appellants also request the recovery of all attorney fees and costs so wrongfully sustained in prosecuting this matter on appeal.

Respectfully submitted,

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[3] If this argument is not to be reviewed because it is considered unaddressed below and thus not preserved for appellate review, then surely the issue, *legal in nature,* may be considered below on remand. Given the legal nature of the question presented, and the period of time this case has been pending, the better course is to now address and resolve the issue.